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Alexandre de Streel (guest article): "Why Legislators Want to Move Fast and Break Things in the Cyberspace?"

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Dear readers,

I am delighted to announce that this month's [guest article](#) is authored by Alexandre de Stree, Professor of digital law at Namur University, Academic co-director at Centre on Regulation in Europe (CERRE) and Chair of the expert group for the EU Observatory on the Online Platform Economy. Alex explores three reasons why regulators are (now) moving fast to regulate the cyberspace. He deals, in short, with the rationale behind our (regulatory) times. I am confident that you will enjoy reading it as much as I did. George, thank you very much!

All the best, Thibault Schrepel

Why Legislators Want to Move Fast and Break Things in the Cyberspace?

As explained in a [previous contribution](#) by Georges Priest for Concurrentialiste, legislators across the world are preparing ambitious laws to regulate Big Tech. The European Commission has proposed the [Digital Markets Act](#) to increase contestability and fairness of the digital economy, the US Congress is debating [Five Bills](#) aimed at increasing choice and innovation, and the Chinese administration is increasingly reining the power of its Digital Champions. Thus, a global consensus is rapidly emerging that the Wild Digital West is over and that Big Tech cannot anymore be left alone.

Some weeks ago, my friend and colleague Nicolas Petit asks why the political pendulum has moved so fast and so forcefully and makes me think of why legislators suddenly want to move fast and break things in the cyberspace? Big Tech firms may have acquired substantial economic, informational, and even political power, but as Nicolas has convincingly shown in his recent book on the [Moligopoly Scenario](#), they are not enjoying the quiet life of a monopolist, they feel and fear the competition of other big and small tech and they continue to innovate feverishly to the benefit of their users. I want to share in this contribution the three main reasons – and their underlying policy trade-off – I came up to explain the regulatory drive against the Big Tech.

The first reason is the willingness to **increase the contestability of the digital markets and better arbitrate the trade-off between short-term and long-term perspectives**. Ensuring contestability means lowering enter barriers, guaranteeing that markets remain open to newcomers, and in the end, protecting the competitive process in and of itself. In this context,

term consequences.

The problem here is that over the last forty years, antitrust policy has tended to focus more on short-term welfare effects (both harms and efficiencies) than longer-term consequences (on competition or innovation). Such evolution has multiple causes, including the increasing influence of economic theories which tended to be static as well as the raising of the standard of proof which makes the demonstration of long-term effects more difficult and sometimes impossible. Going back to the ordo-liberal roots of antitrust with the goal of preserving the competitive process and open markets, can reverse this short-term bias and allow a better balancing between short- and long-term perspectives.

Of course, we should be mindful of not going back to the too simplistic Joe Bain's Structure-Conduct-Performance paradigm where big is bad and ugly. We should not decide a public intervention solely on the basis of structural criteria and condemn a firm merely because of its size. We should also be careful that the protection of long-term competition should not broaden excessively the regulatory discretion of public agencies. This is a risk because in the long term, not only are we all dead as Keynes famously said but also all futures are possible, hence in the name of protecting the future, all interventions would be defensible. This risk should be prevented because, as Pablo Ibanez Colomo very usefully [explains for Concurrentialiste](#), controlling the discretion of public agencies is in the interest of all, firms, users, and agencies alike. Thus, a key challenge ahead of us is to develop more dynamic economic theories which are not purely structural, which remove current short-term bias and allow a meaningful control of agencies discretion.

The second reason of the regulatory drive against Big Tech is the willingness to **increase fairness and better arbitrate the inevitable trade-off between the winners and the losers of a technological and industrial revolution**. There is little doubt that the 4th industrial revolution has brought enormous benefits to the economy and the society across the world. To be convinced, just think at how we would have faced the Covid-19 lockdown without video-conferencing, e-commerce or social networks. There is little doubt as well as that most of the newly generated value has been captured by the precursors and the innovators of the 4th industrial revolution and that some others – the displaced previous incumbents – have lost a lot. This is not surprising as history tells us that at the beginning of each industrial revolution, revenues tend to concentrate among the first few firms that master the new technologies

Why bother could you think? In the end, it is good for innovation when innovators can recoup

Here again, we should be careful because everyone has her own conception of what is fair. Also, fairness laws are always subject to intense political lobbying and regulatory capture as brilliantly demonstrated [by George Stigler](#). In turn, fairness laws may backfire and destroy value instead of redistributing it. Thus, the challenge is to identify clearly what fairness do we collectively want to achieve, what are the possible trade-off between value creation and value distribution, and which policy mix can reduce this trade-off to the minimum.

The last reason for the regulatory drive against Big Tech – which is probably the most powerful – is the willingness of **the State to take back control of the digital space and better arbitrate the usual trade-off between the State and the Market**. As long as the digital space remained marginal, it could be left independent as hoped by John Perry Barlow in its [1996 Declaration of Independence of the Cyberspace](#). But the ideas of Barlow have proven to be naïve on at least two accounts: first, on the incentives and the ability of cyberspace users and firms to create what he called a 'civilization of the Mind' which would have been more humane and fairer than what the States had made before; second on the incentives and the ability of those States to regulate and structure a space that has become increasingly important for the life of their citizens and firms. As explained by [EU Commissioner Thierry Breton](#), the current progressive regulation of digital space repeats the previous progressive regulation of the terrestrial and then maritime spaces.

Here again, legislators should be mindful not to overreact. It is probably relevant to regulate more the cyberspace and subject it to the same rules as the offline world. But it may be a step too far for the State to organize itself this cyberspace (and the business models of the Big Tech) or to directly provide the infrastructures of this increasingly important space.

In nutshell, it appears to me that the current regulatory drive against the Big Tech is perfectly justified and reflects the need and the willingness to better arbitrate several usual policy trade-offs. The new Big Tech laws should favor long-term competition over short-term efficiency, should better distribute the new value generated by the 4th Industrial Revolution, and should subject the cyberspace – which has not delivered on the promises of the naïve libertarians – to the same rules as the offline spaces. Yes. legislators should move fast!